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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAIR ENTITLEMENTS GUARANTEE BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations,
the Honourable William Richard Shorten, MP)

FAIR ENTITLEMENTS GUARANTEE BILL 2012

OUTLINE

The *Fair Entitlements Guarantee Bill 2012* (the Bill) will replace the administrative General Employee Entitlements and Redundancy Scheme (GEERS) which currently assists employees who have lost their employment due to the liquidation or bankruptcy of their employer and who are owed certain employee entitlements.

A scheme such as the one created by the Bill is necessary to fulfil a significant community need to protect the entitlements of Australian employees who would otherwise stand to lose their entitlements if they lose their jobs due to insolvency of their employer. While alternative measures for protecting employee entitlements are available on a limited scale (for example, redundancy trust funds in the construction industry) these are insufficient to adequately protect employees.

The primary objective of the Bill is to provide a scheme for the provision of financial assistance (called an 'advance') to former employees where the end of their employment is linked to the insolvency or bankruptcy of their employer. After making an advance, the Commonwealth assumes the individual's right to recover the amount that was advanced through the winding up or bankruptcy process of their employer.

Some of the key eligibility requirements for which the Secretary must be satisfied in order for an advance to be paid include that:

- the person's employment has ended;
- the end of the employment is linked to the insolvency of their employer;
- the employer is in liquidation or bankruptcy; and
- the person has unpaid employment entitlements that cannot be obtained from another source.

The causal link between the insolvency of the employer and the end of the person's employment is a crucial element of the eligibility requirement. The Bill assumes that the connection exists where the end of the person's employment came after or within 6 months of the appointment of an 'insolvency practitioner'. This term is defined broadly to include liquidators, administrators, receivers of property and persons having possession or control of property of the employer for the purpose of enforcing a charge, lien or a security interest as defined in the *Personal Properties Security Act 2009*.

Once eligibility has been established, the Bill provides for the determination of the amount of an advance that a person is entitled to. A person's entitlement is comprised of their unpaid entitlements in relation to unused annual leave, unused long service leave, payment in lieu of

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notice, redundancy pay and wages for a 13-week period. These entitlements are determined in accordance with the person's governing instrument (as defined in clause 5 of the Bill).

An advance may be paid directly to the individual, or to the liquidator or a third party contracted by the Commonwealth for the purpose of passing the advance on to the recipient. Once an advance has been paid, the Commonwealth assumes the person's recovery rights in the winding up process to the extent of the advance in order to recover some or all of that advance. If the recipient is later paid an amount for a particular entitlement from another source, the Bill provides that an amount not exceeding the amount of the original advance becomes a debt owed to the Commonwealth.

The Bill also provides for a range of administrative matters, including those relating to how information obtained through the operation of the scheme is handled by the Department.

<u>Abbreviations used in this EM</u>	<u>Meaning</u>
AAT	Administrative Appeals Tribunal
AAT Act	<i>Administrative Appeals Tribunal Act 1975</i>
Bankruptcy Act	<i>Bankruptcy Act 1966</i>
Corporations Act	<i>Corporations Act 2001</i>
Fair Work Act	<i>Fair Work Act 2009</i>
GEERS	General Employee Entitlements and Redundancy Scheme

FINANCIAL IMPACT STATEMENT

The Bill will legislate existing administrative arrangements under GEERS. Claims for financial assistance under the Bill are not expected to be more than the claims that would have been administered under GEERS. The existing funding under the GEERS appropriation will be carried forward through a demand driven special appropriation under this Bill.

FAIR ENTITLEMENTS GUARANTEE BILL 2012

Part 1—Preliminary

Overview

1. Part 1 sets out various preliminary provisions, including definitions.

Notes on clauses

Clause 1 – Short title

2. Clause 1 provides that, once enacted, the short title of the Bill will be the *Fair Entitlements Guarantee Act 2012*.

Clause 2 – Commencement

3. This clause sets out the commencement provisions.

Clause 3 – Objects of this Act

4. This clause sets out the objects of the Bill. The object is to establish a legislative scheme through which the Commonwealth will pay advances to former employees whose employment has ended as a result of their employer's insolvency or bankruptcy where the former employees cannot get payment of their entitlements from other sources. For the purposes of the scheme, the term 'employee' refers to an employee at common law and does not include contractors. The Bill will provide a legislative basis for the assistance currently provided under GEERS.
5. The Bill provides that the Commonwealth is able to recover advances through winding up or bankruptcy proceedings or where the employee receives a payment for an entitlement from any other source.

Clause 4 – Simplified outline of this Act

6. This clause provides a simplified overview of this Bill.

Clause 5 – Definitions

7. This clause contains a list of terms that are defined in the Bill. It includes a number of 'signpost' definitions that refer readers to the sections in which terms are substantively defined.
8. The definitions appear in alphabetical order in the Bill. A number of key definitions are outlined below.

Advance

9. Advance means financial assistance under this Bill on account of employment entitlements.

Bankruptcy Act 1966

10. References to the ‘Bankruptcy Act’ in the Bill are to be read broadly. References to the Bankruptcy Act or a provision of that Act, for the purposes of the Bill, includes references to that Act as it is applied (with or without modification) by another law of the Commonwealth, a State or a Territory.

Bankruptcy trustee

11. Bankruptcy trustee of a person means the relevant appointed trustee under the Bankruptcy Act.

Corporations Act 2001

12. References to the ‘Corporations Act’ in the Bill are to be read broadly. References to the Corporations Act or a provision of that Act, for the purposes of the Bill, includes references to that Act as it is applied (with or without modification) by another law of the Commonwealth, a State or a Territory. Examples of this include the Commonwealth’s *Corporations (Aboriginal and Torres Strait Islander) Act 2006* and State and Territory Acts relating to incorporation of associations and cooperatives.

Cost

13. Cost of the winding up or the bankruptcy of an employer is defined to mean an expense that a liquidator or a bankruptcy trustee incurs in the winding up as described in the Corporations Act (in the case of a company); or the costs, charges and expenses of the administration of bankruptcy under the Bankruptcy Act (in the case of individuals).
14. This concept is referred to when working out the basic amount of a person’s entitlement in Division 2 of Part 3, namely clauses 19(2), 20, 21, 22 and 23.

Employer

15. A reference in the Bill to ‘employer’ includes a person’s former employer.

Employment entitlement

16. The following entitlements are ‘employment entitlements’:
- Annual leave entitlement;
 - Long service leave entitlement;
 - Payment in lieu of notice entitlement;

Part 1—Preliminary

- Redundancy pay entitlement; and
- Wages entitlement.

Governing instrument

17. An individual's employment entitlements will be determined in accordance with the governing instrument under which they are employed. This includes:
- A written law of the Commonwealth, a State or a Territory;
 - An award, determination or order that is made or recorded in writing;
 - A written instrument; or
 - An agreement (whether a contract or not).

Insolvency event

18. The insolvency event is a crucial trigger for the operation of the scheme. Eligibility for the scheme cannot be established prior to the occurrence of an insolvency event. This definition provides that an insolvency event occurs when:
- A liquidator of the employer is appointed (provisionally or otherwise) under the Corporations Act; or
 - The employer becomes a bankrupt under the Bankruptcy Act.
19. Special provision is also made for individuals employed for a partnership by 2 or more of the partners. The term '2 or more of the partners' is included to deal with situations where some but not all of the partners in a partnerships are responsible for meeting employee entitlements. In relation to partnerships, an insolvency event occurs when:
- A liquidator of the partnership is appointed (provisionally or otherwise) under the Corporations Act; or
 - Every partner by whom the person is or was employed in the partnership becomes a bankrupt under the Bankruptcy Act or is subject to the appointment of a liquidator (provisionally or otherwise) under the Corporations Act. In such cases, the 'insolvency event' is taken to occur on the date that the last partner becomes bankrupt or is subject to the appointment of a liquidator.

Insolvency practitioner

20. The date at which an insolvency practitioner is appointed for an employer is an important element in determining whether an individual is eligible for an advance under the scheme.

Part 1—Preliminary

21. Eligibility for the scheme only arises if the ending of an individual's employment was due to the insolvency of their employer. The clearest indication of an employer's insolvency is the appointment of a liquidator or bankruptcy trustee.
22. While this is the final step in the path towards winding up or bankruptcy, several preceding steps are recognised in the Bill's definition of 'insolvency practitioner' in order to capture other events that, with the hindsight of an insolvency event, can be used as evidence of an employer's insolvency. These are:
 - The appointment of an administrator under the Corporations Act;
 - The appointment of a person as a receiver of property of the employer; or
 - A person taking possession or control of property of the employer for the purpose of enforcing a charge, mortgage, lien, pledge or a security interest as defined in the *Personal Properties Securities Act 2009*.

Liquidator

23. A liquidator means a liquidator appointed (provisionally or otherwise) under the Corporations Act.

Maximum weekly wage

24. The concept of a 'maximum weekly wage' is used in Part 3 when determining the amount of advance that an individual is entitled to under the scheme.
25. The initial maximum weekly wage of \$2,364.00 is a continuation of the existing threshold set under GEERS as has been determined in accordance with the Fair Work Act's 'high income threshold'.
26. Paragraph (b) provides that the maximum weekly wage will be indexed by reference to estimates of full-time adult average weekly ordinary time earnings published by the Australian Statistician. The baseline amount for indexation will be the most recently indexed iteration of the maximum weekly wage. For example, the first indexation will be applied to the initial maximum weekly wage of \$2,364.00. This new maximum weekly wage will apply until the next indexation, at which point the new figure will be used as the baseline amount to determine the next maximum weekly wage.
27. Paragraph (b) provides that indexation will take place in accordance with the regulations. These regulations will determine the method by which indexation is applied.

Wages entitlement period

28. A person's 'wages entitlement' (as defined in clause 6) is limited to the 13 weeks ending at the earlier of:
 - The end of the person's employment; or

- The first time an insolvency practitioner has power to control or manage the employment of the employer or, if the person was employed by a partnership of 2 or more partners, any of the partners who employed the person.

Clause 6 – Kinds of employment entitlements

29. Clause 6 provides definitions for the employment entitlements of a person who meets the conditions for eligibility contained in Part 2. All entitlements are determined with reference to the person's governing instrument (as defined in clause 5).
30. Subclause 2 provides that a person's 'annual leave entitlement' will be the amount the person is entitled to for paid annual leave that the person had accrued at the end of the employment and had not taken by then.
31. Subclause 3 provides that a person's 'long service leave entitlement' will be the amount the person is entitled to from the employer at the end of their employment. This will include:
 - Long service leave that the person had accrued but not taken by the end of their employment; or
 - Long service leave that, had the person's employment continued until the person qualified for long service leave, would have been attributable to the period before the actual end of the person's employment.
 - A person will only be entitled to a pro-rata long service leave amount if the relevant industrial instrument expressly provides for this.
32. Subclause 4 provides that a person's 'payment in lieu of notice leave entitlement' will be the amount the person is entitled to from the employer for a shortfall in the period of notice of termination of the employment.
33. Subclause 5 provides that a person's 'redundancy pay entitlement' is the amount of redundancy pay that the person is entitled to from the employer for termination of the employment.
34. Subclause 6 is the amount of 'wages' the person is entitled to from the employer for work done, or paid leave taken, in the wages entitlement period. The 'wages entitlement period' is defined in clause 5 to mean the 13 weeks ending at the earlier of the end of the person's employment or the first time an insolvency practitioner has power to control or manage the employment by the employer.
35. Subclause 7 provides that a person's entitlement under clause 6 is not altered by the person's receipt of some or all of an amount he or she was entitled to under their governing instrument. In practice, amounts received in relation to a particular entitlement would be reduced in accordance with clause 19.

Clause 7 – Wages

36. Clause 7 provides that the term ‘wages’ is to have its ordinary meaning.
37. Subclause 1 further clarifies that wages includes the following:
- Allowances;
 - Loadings;
 - Amounts payable for overtime;
 - Amounts payable at penalty rates; and
 - Other amounts that the governing instrument for the relevant employment identifies separately and makes payable regularly.
38. This list is not exhaustive, but rather provides the reader with some examples of what a ‘wage’ is according to the ordinary meaning.
39. Subclause 2 provides that the term ‘wages’ does not include the following:
- Discretionary payments (such as bonuses);
 - Reimbursements; and
 - Payments of expenses relating to travel or relocation.
40. Subclause 3 clarifies that amounts that are not payable on an ongoing basis are not ‘wages’ unless they are amounts described in subclause 1.

Clause 8 – This Act binds the Crown

41. Clause 8 provides that the Crown in each of its capacities is to be bound by the Bill.

Clause 9 – Extraterritorial operation

42. The Bill includes making of payments to, and the recovery of amounts from, persons outside Australia. This will allow payment to eligible former employees and recovery from entities and individuals not based in Australia when all other eligibility requirements have been established by the claimant.

Part 2—Eligibility for advance

Overview

43. Part 2 contains provisions about who is eligible for an advance under the scheme.
44. Division 1 provides the basic criteria for eligibility for an advance under the scheme and the exclusions from eligibility.
45. Division 2 makes provisions for how an effective claim must be made.

Notes on clauses

Division 1—Conditions of eligibility for advance

Subdivision A—Basic conditions of eligibility

Clause 10 – Conditions of eligibility for advance

46. Financial assistance under the scheme will be called an ‘advance’, which is defined in clause 5. An individual’s eligibility for an advance will be established if the Secretary is satisfied that all of the criteria contained in subclause 1 have been satisfied. The Secretary will only be satisfied that the criteria are met when there is sufficient evidence to support the individual’s claim for eligibility.
47. Paragraph (a) provides that the individual’s employment must have ended.
48. Paragraph (b) provides that an ‘insolvency event’ (as defined in clause 5) must have happened to the employer of the individual.
49. Paragraph (c) provides that a link must be demonstrated between the end of the individual’s employment and the insolvency of their employer. This could be demonstrated in one of three ways:
 - The end was due to the insolvency of the employer. This will require sufficient evidence to satisfy the Secretary that the insolvency of the employer caused the end of the employment. In practice, this evidence will generally be provided by the liquidator or bankruptcy trustee following their investigation of the employer’s financial situation. For example, the liquidator or bankruptcy trustee may advise that an entity was trading insolvent more than 6 months before the date of insolvency which would generally support a link to insolvency. Individuals will also be able to submit evidence that demonstrates this link, such as correspondence with their employer relating to the end of their employment.
 - The end occurred less than 6 months before the appointment of an insolvency practitioner for the employer. Given the proximity of the end of the employment to

the appointment of the insolvency practitioner in these situations, no further evidence explicitly linking the end to the insolvency of the employer is required.

- The end occurred after appointment of an insolvency practitioner for the employer. The term ‘insolvency practitioner’ is defined in clause 5.
50. Paragraph (d) provides that an individual must be owed debts relating to their employment entitlements. The various kinds of employment entitlements are defined in clause 6. In relation to these debts, the individual must have taken reasonable steps during the winding up or bankruptcy process to prove those debts (paragraph (e)).
 51. In practice, the requirement to take reasonable steps to prove debts in paragraph (e) will generally be demonstrated by the individual having completed a ‘proof of debt’ form and submitted this to the liquidator or bankruptcy trustee. This form ensures that the person is known to the liquidator or bankruptcy trustee and provides the evidentiary basis for their claim.
 52. Paragraph (f) requires a person to have taken reasonable steps to be paid outstanding entitlements if the debts were owed before the insolvency event happened. The qualifier ‘reasonable steps’ will ensure that the decision maker is able to consider each individual’s situation on its own merits and avoid unjust outcomes. Where a person was unaware they were owed a debt, for example, it would generally not be reasonable to expect them to have taken steps to be paid that amount. Also, it will permit the Secretary to acknowledge that commencing legal action to recover outstanding entitlements may not have been reasonable due to either the size of the amount, or the level of education or language skills that the person holds.
 53. Generally, a person will be eligible if they have taken ‘reasonable steps’ such as bringing the outstanding entitlement to the employer’s attention or seeking assistance from the Fair Work Ombudsman.
 54. Paragraph (g) provides that, to be eligible for an advance, an individual must have been an Australian citizen or held a permanent visa or a special category visa under the *Migration Act 1958* at the time their employment ended.
 55. Paragraph (h) limits eligibility to individuals who have lodged a claim in accordance with Clause 14 of the legislation.
 56. Subclause 2 sets out special rules which apply to individuals who were employed by 2 or more persons for a partnership, and deems that subclause 1, paragraphs (c), (d) and (e) apply as if the criteria must be met for each of the partners. The purpose of the term ‘2 or more of the partners’ is described above in the definition of ‘insolvency event’ in clause 5.

Subdivision B—Exclusions from eligibility

Clause 11 – Exclusion for personal connection with employer

57. Subclause 1 is included to ensure that individuals who are an ‘excluded employee’ for the purposes of the Corporations Act will not be eligible for an advance under the proposed scheme. This encompasses an employee who, at any time in the 12 months prior to the winding up, was a director, spouse of a director or a relative of a director of the employer being wound up.
58. Subclause 2 sets out an ‘excluded employees’ rule for individuals whose employer is or was a bankrupt under the Bankruptcy Act.
59. Subclause 3 provides that a person employed for a partnership by 2 or more of the partners will not be eligible for an advance if the conditions in subclause 1, or any of the conditions in subclause 2, exist in relation to the partners who employed the person. The purpose of the term ‘2 or more of the partners’ is described above in the definition of ‘insolvency event’ in clause 5.

Clause 12 – Exclusion for being newly employed after working as contractor

60. In order to be eligible for an advance an individual will have to have been an ‘employee’ of an employer. For the purposes of the scheme, the term ‘employee’ refers to an employee at common law and does not include contractors.
61. Subclause 1 provides that a person is not eligible for an advance where the Secretary is satisfied that:
 - A person had been engaged under other arrangements, including as a contractor, and transfers to employment within 6 months of the end of the employment or the appointment of an insolvency practitioner (as defined in clause 5) for the employer; and
 - It was reasonable to expect at the start of that employment that the employer would not be able to employ the person on the terms and conditions of that employment beyond the time that employment actually ended.
62. Subclause 2 sets out a special rule which applies to individuals who were employed by 2 or more of the partners for a partnership. The purpose of the term ‘2 or more of the partners’ is described above in the definition of ‘insolvency event’ in clause 5.
63. Subclause 3 provides that the clause has effect despite clause 10 (conditions of eligibility for advance).

Clause 13 – Exclusion for employment by certain employers

64. Clause 13 provides that a person is not eligible for an advance if their former employer was within the scope of the Special Employee Entitlements Scheme for Ansett Group Employees.

Division 2—Claim for eligibility for advance

Clause 14 – Making an effective claim

65. Clause 14 sets out what is necessary for a claim to be ‘effective’ for the purposes of this Bill.
66. Subclause 1 specifies that a claim for an advance must:
- be in a form approved by the Secretary; and
 - be accompanied by any documents required by the Secretary; and
 - be made in accordance with subclauses 2 and 3.
67. Subclause 2 specifies the timeframes within which a claim must be made. To be effective, a claim must be made before the end of 12 months after the later of the following events:
- an insolvency event (as defined in clause 5) happens to the employer;
 - the person’s employment by the employer ends.
68. Subclause 3 states that if the employer in question is or was bankrupt, the claim must be or have been made before the discharge of the employer’s bankruptcy.
69. Subclause 4 provides that a claim made under the scheme established by this Bill will not be effective if the individual had already made a claim (the ‘earlier claim’) under GEERS that was connected with the person’s employment by the employer. This will provide certainty by clarifying that decisions made under GEERS will not be reassessed under this Bill.
70. Subclause 5 provides that subclause 4 does not apply if the earlier claim was rejected on the grounds that an insolvency event had not yet happened to the employer. This will ensure that individuals are not unfairly made ineligible as a result of prematurely seeking an advance under GEERS.

Clause 15 – Secretary must decide effective claim

71. This clause provides that if an effective claim is made to the Secretary, the Secretary must decide whether the person is eligible for an advance. If the Secretary decides that the person is eligible for an advance, the Secretary must then decide the amount of the advance (subclause 2).

Part 3—Amount of advance

Overview

72. Part 3 explains how to work out the amount of an advance for a person, taking account of the person's employment entitlements as identified in clause 6. The amount of the advance may be reduced for a number of reasons, including where the person has funds available from another source (e.g. a redundancy trust) or the liquidator or bankruptcy trustee expects to be able to pay entitlements in full within 112 days.
73. Division 1 provides that the advance of a person's employment entitlements is subject to a number of exclusions. These include where some entitlements could be transferred to a new employer, where the employee owes the employer a debt and where the liquidator is likely to pay the amount of the entitlement within 112 days.
74. Division 2 sets out how a person's employment entitlements are worked out. This involves working out the basic entitlements for each of the employment entitlements a person is owed under subdivisions B and C, and then deducting the sums specified in subdivision A.

Notes on clauses

Division 1—Working out the amount of an advance

Clause 16 – General rule for working out the amount of an advance

75. Clause 16 provides that the total amount of an advance a person will be eligible for is the sum of the entitlements worked out through the operation of Division 2.
76. Subclause 2 provides that entitlements for payment in lieu of notice or redundancy pay will not form part of an advance if:
- The business in which the employer employed the person is transferred to someone else (other than the bankruptcy trustee); and
 - Within 14 days of the end of the person's employment, the new business operator offers to employ the person:
 - To do work that is the same as, or substantially similar to, the work the person did for the original employer; and
 - On terms and conditions substantially similar to, and no less favourable than, the person's original employment terms and conditions.
77. In such cases, notwithstanding that the insolvent employer may have legal obligation to pay redundancy or payment in lieu of notice, a person is not entitled to have those entitlements paid as an advance under this Bill as the person's employment status has continued with only a minor interruption.

78. However, a person's entitlement to payment in lieu of notice and redundancy pay entitlements will be revived by subclause 3 if:
- The new business operator terminates the person's employment because the position is no longer required to be filled by any person, except where this is due to the ordinary and customary turnover of labour; or
 - An insolvency event happens to the new business operator, the person's employment by the new operator ends; and:
 - The end was due to the insolvency of the new operator; or
 - The end occurred less than 6 months before the appointment of an insolvency practitioner for the new operator; or
 - The end occurred on or after the appointment of an insolvency practitioner for the new operator.
79. Subclause 4 provides that subclause 2 will not apply to insolvency events occurring on or after 1 July 2014. From this time, whether a person is eligible for a particular entitlement when they have transferred employment will be a question of fact to be determined in accordance with their governing instrument and other relevant laws, such as the Fair Work Act.

Clause 17 – Reduction for the person's debts to the employer

80. Clause 17 provides that the Secretary may reduce the amount of a person's advance by any amount that the person owes to the employer. This amount must not exceed the sum of the person's debts to the employer.

Clause 18 – Nil amount if liquidator or bankruptcy trustee can fully pay entitlements soon

81. Clause 18 provides that the Secretary may reduce a person's advance to nil, and effectively not pay an advance, if the Secretary is satisfied that the liquidator or bankruptcy trustee of the employer expects to have sufficient funds to pay the person the full amount of the advance within the next 112 days. This reflects the object of the legislation to provide an advance on employment entitlements only when the person cannot get payment of the entitlement from another source.
82. If payment is not made within the 112 days, the person may utilise the review mechanisms available under Division 2 of Part 6 to have this decision reconsidered in light of the non-payment. In practice, it is anticipated that a review of a person's entitlement will be undertaken on the Secretary's initiative upon the Department becoming aware of the non-payment.

Division 2—Amounts for employment entitlements

Subdivision A—Working out amounts for employment entitlements

Clause 19 – Working out amounts for employment entitlements

83. Clause 19 provides that the amount to be advanced to a person is determined by working out the basic amount for their employment entitlements (as defined in clause 6) under Subdivisions B and C of Division 2 and then reducing that amount (but not below nil) by the sum of the amounts described in subclauses 2 and 3 of clause 19.
84. Subclause 2 deals with amounts that have already been paid to the person and states that each of a person's employment entitlements should be reduced by amounts that:
- Are attributable to that entitlement; and
 - Have been paid by anyone to the person to whom the entitlement is owed or to someone else for the person's benefit or in accordance with the person's direction; and
 - Are not costs of the winding up or bankruptcy of the employer (a 'cost' for these purposes is defined in clause 5).
85. Subclause 3 deals with amounts that will be paid to the person and provides that each of a person's employment entitlements should be reduced by the total of amounts that:
- Are attributable to that entitlement; and
 - Are payable (and have not been paid) by anyone to the person to whom the entitlement is owed or to someone else for the person's benefit or in accordance with the person's direction; and
 - Are not payable under the Corporations Act in the winding up of the person's employer, the Bankruptcy Act from the proceeds of the property of the bankrupt employer or under this Bill.
86. The reductions provided for in subclause 2 and 3 ensure that, in working out the amount of an advance, the amount will not include payments that have already been received (subclause 2) or that will be received in future through another source (subclause 3). This could include money paid or owed by redundancy trusts or where the entitlement relates to employment after the appointment of an insolvency practitioner with responsibility for meeting those debts.

Subdivision B—General rules for basic amounts for employment entitlements

87. Subdivision B sets out the general rules for how the five types of employment entitlements (as defined in clause 6) are to be calculated. Clauses 20 to 23 provide only for entitlements

(or part of an entitlement) that are ‘not a cost of the winding up or bankruptcy of the employer’ (with ‘cost’ being defined in clause 5).

88. Entitlements that are costs of the winding up or costs of the bankruptcy will not be covered by this legislation as they are expenses required to be borne by an insolvency practitioner under the Corporations Act or the Bankruptcy Act. A cost of the winding up generally refers to expenses that are incurred by a liquidator or bankruptcy trustee in the course of their duties, which includes employee entitlements that accrue for work performed by employees after the appointment of the liquidator or bankruptcy trustee.
89. Note: section 558 of the Corporations Act and section 109A of the Bankruptcy Act determine how debts relating to employee entitlements are dealt with when a liquidator or bankruptcy trustee continues employing staff during the winding up process.

Clause 20 – Basic amount for annual leave entitlement

90. Clause 20 provides that the basic amount for a person’s annual leave entitlement (as defined in clause 6) for his or her employment by an employer is so much of the entitlement as is not a cost of the winding up or bankruptcy of the employer (as defined in clause 5).

Clause 21 – Basic amount for long service leave entitlement

91. Clause 21 provides that the basic amount for a person’s long service leave entitlement (as defined in clause 6) for his or her employment by an employer is so much of the entitlement as is not a cost of the winding up or bankruptcy of the employer (as defined in clause 5).

Clause 22 – Basic amount for payment in lieu of notice entitlement

92. Clause 22 provides that the basic amount for a person’s payment in lieu of notice entitlement (as defined in clause 6) for his or her employment by an employer is so much of the entitlement as is not a cost of the winding up or bankruptcy of the employer (as defined in clause 5) and does not exceed 5 weeks’ pay at the rate relevant to working out that entitlement.

Clause 23 – Basic amount for redundancy pay entitlement

93. Clause 23 provides that the basic amount for a person’s redundancy pay entitlement (as defined in clause 6) is 4 weeks wages for each year served with the employer where the employer was required to pay redundancy pay. The basic amount does not include any redundancy pay entitlement that is a cost of the winding up or bankruptcy of the employer (as defined in clause 5). The amount is capped at the total of:
- 4 weeks’ pay (at the rate relevant to working out that entitlement) for each full year of the person’s service with the employer; and

- If the employee was entitled to payment of redundancy pay for a proportion of a year of the person's service, that portion of the 4 weeks' pay (at the rate relevant to working out that entitlement).

Clause 24 – Basic amount for wages entitlement

94. Clause 24 provides that the basic amount for a person's wages entitlement (as defined in clause 6, and subject to the 'wages entitlement period' as defined in clause 5) is the total of the wages entitlement, less any amount required to be withheld under Part 2-5 (PAYG withholding) in Schedule 1 to the *Taxation Administration Act 1953* from the wages covered by the entitlement.
95. Amounts that are required to be withheld by PAYG, will be a debt owed by the employer to the Australian Tax Office and are not owed to the individual making an application for an advance.

Subdivision C—Special rules for basic amounts for employment entitlements

Clause 25 – Disregarding recently agreed changes in terms and conditions

96. Clause 25 provides that the Secretary may choose to disregard changes that improve the terms and conditions of the person's employment in the 6 months prior to the end of employment or the appointment of an insolvency practitioner (as defined in clause 5) for the employer. If the Secretary is satisfied that it is appropriate for this clause to apply, the basic amount of the person's entitlements would be worked out as if the governing instrument (as defined in clause 5) for the employment had not been changed.
97. This provision will provide an avenue to disregard changes in the rare situation that a person's entitlements are artificially inflated in the knowledge that an insolvency event is likely to occur. Before utilising this discretion, the Secretary will first have to be satisfied that, at the time of the change, it was not reasonable to expect that the employer would be able to continue to employ the person on those more favourable terms and conditions beyond the time of the actual end of the person's employment. The Secretary may consider, in deciding what is reasonable, the full context surrounding the increase, including how the employer and employees agreed to the increase and whether the financial position of the employer was disclosed to the employees. Where changes are reflected in an enterprise agreement made under the Fair Work Act, prior to exercising the discretion the Secretary would need to be satisfied there is evidence of an intention to artificially inflate the terms and conditions of employment in the knowledge that an insolvency event is likely to occur.
98. When applied to partnerships, the 6 months time period will be triggered by the appointment of an insolvency practitioner for 2 or more of the partners who employ that person. The purpose of the term '2 or more of the partners' is described above in the definition of 'insolvency event' in clause 5. In relation to the agreement of the employer to change the conditions and the reasonableness of the expectation that the employer would

be able to continue employing the person on those more favourable terms, the reference is to all the partners who employed the person.

99. This clause will assist in preventing manipulation of the scheme to artificially inflate the advance that will be owed to their employees.

Clause 26 – Applying maximum weekly wage rate—entitlements except wages entitlement

100. Clause 26 provides for a maximum weekly wage cap, which will effectively limit the weekly rate at which an entitlement will be paid to an individual. The clause will affect a person’s employment entitlements (except wages entitlement) if their weekly rate of pay, as determined in accordance with the governing instrument (as defined in clause 5) for his or her employment, exceeded the maximum weekly wage rate at the end of his or her employment.
101. If clause 26 does apply, the amount of the entitlement will be calculated as if the employment entitlement is to be paid at the maximum weekly wage rate. The maximum weekly wage is defined in clause 5.
102. Subclause 3 clarifies that clause 26 will not apply to a person’s wages entitlement, which is subject to separate arrangements as outlined in clause 27.

Clause 27 – Applying maximum weekly wage rate—wages entitlement

103. Clause 27 provides for how a person’s weekly wage rate will be determined for the purpose of comparing it with the maximum weekly wage cap, which will effectively limit the amount that may be paid as a wages entitlement to an individual. The clause will affect a person’s wages entitlement if any of the rules in subclauses (2), (3) or (4) apply to the individual.
104. Subclause 27(6) provides that if clause 27 does affect a person’s wages entitlement (because one of the rules in subclauses (2), (3) or (4) applies), the basic amount will be worked out as if the governing instrument for the employment had entitled the person, for each of the weeks for which the employer employed the person in the wages entitlement period, to wages at the maximum weekly wage rate at the end of that period. The maximum weekly wage is defined in clause 5.
105. The rule in subclause 27(2) will apply to individuals who have a consistent weekly wage. The subclause provides that a person’s wages entitlement will be affected where their governing instrument provided for a rate of pay that the instrument envisaged that the person would do regularly, and that rate, when expressed as a weekly rate, exceeds the maximum weekly wage rate. The governing instrument is to be taken as the instrument that was current at the end of the wages entitlement period (i.e. 13 weeks).
106. Subclause 27(3) will apply to individuals whose weekly wage fluctuates because, for example, they work under a commission based pay structure. The subclause provides that a person’s wages entitlement will be affected where:

Part 3—Amount of advance

- Their governing instrument did not provide for a rate of pay at the end of the wages entitlement period for work that the instrument envisaged that the person would do regularly; and
 - The person's actual average weekly wage for that period is greater than the maximum weekly wage at the end of that period.
107. As the governing instrument does not provide a rate of wages in this situation, subclause 27(3) provides for the rate to be determined by dividing the wages earned by the person by the number of weeks he or she was employed by the employer in that period.
108. Subclause 27(4) will apply to an individual where the Secretary is satisfied of certain matters and applies this rule. This subclause provides that a person's wages entitlement will be affected where the Secretary is satisfied that:
- Over the weeks for which the person was employed in the wages entitlement period, there was not a regular pattern of hours worked by the person or wages to which the person was entitled for work done or leave taken within those weeks; and
 - The person's average weekly wage for that period was greater than the maximum weekly wage at the end of that period.
109. The rate in these situations is determined by dividing the person's wage by the number of weeks for which he or she was employed by the employer in that period.

Part 4—Payment of advance

Overview

110. Part 4 places an obligation on the Commonwealth to pay an advance to an eligible person and outlines how payments may be made.

Notes on clauses

Clause 28 – Payment to eligible person or intermediary

111. Subclause 1 provides that where the Commonwealth is obliged to pay an advance to an eligible person, payments may be made to the person directly or to the relevant liquidator or bankruptcy trustee of the employer. Payments may also be made to another person (a ‘payee’) for the payee to pass on to the eligible person. This situation may arise when a third party is contracted by the Government to process payments. This range of options will allow the Department to pay entitlements through the relevant liquidator or bankruptcy trustee of the employer, or to arrange for direct payment when the claim is determined to be low risk and low value.
112. Subclause 2 provides that the Secretary may pay an advance to an eligible person in instalments if doing so would result in the person receiving an instalment of the advance sooner than if the advance was not paid in instalments. This will provide flexibility to pay an instalment where, for any reason, it is expected that the determination of a person’s full entitlement may take significant time. In all circumstances, an advance can only be paid in instalments when a person has been determined to be eligible under the scheme.
113. Subclause 3 provides that the Minister may direct the Secretary to pay an advance in instalments to either a specified person or to all persons who were employed by a specified employer. Subclause 4 provides that the Secretary must comply with a direction made under subclause 3.
114. A decision by the Secretary to pay an advance in instalments or not to pay an advance in instalments is not reviewable by the AAT under Part 6 of this Bill. This reflects that this decision by the Secretary will affect only timeframes for payment of an advance and will not impact upon the actual entitlements of an individual.
115. Subclause 5 clarifies that a direction made in writing under subclause 3 is not a legislative instrument.

Part 5—Recovery of advance

Overview

116. Part 5 deals with the Commonwealth’s ability to recover money advanced through this legislation.
117. Division 1 establishes the framework for recovering money through winding up or bankruptcy proceedings. It is intended that the Commonwealth will have the same rights to receive payment from the liquidator or bankruptcy trustee as the employee would be entitled to receive and that the Commonwealth will stand in the shoes of the employee in exercising rights to priority for payments under the Corporations Act and Bankruptcy Act.
118. Division 2 allows the Commonwealth to recover money advanced through this legislation when the employee later receives, from another source, an amount for an employment entitlement that was part of the advance.

Notes on clauses

Division 1—Recovery through winding up or bankruptcy

Clause 29 – Recovery of advance paid to liquidator

119. Clause 29 supports the object of the Bill to allow the Commonwealth to recover advances through the winding up of the relevant employer by clarifying how payments of an advance are to be treated for the purposes of section 560 of the Corporations Act.

Clause 30 – Recovery of some amounts of advance paid to bankruptcy trustee

120. Clause 30 supports the object of the Bill to allow the Commonwealth to recover advances through the bankruptcy of the relevant employer by clarifying how payments of an advance are to be treated for the purposes of section 109(2) and (3) of the Bankruptcy Act.

Clause 31 – Recovery in other circumstances

121. Clause 31 provides that, when an advance is paid under this legislation for a person’s employment by an employer then, to the extent of the amount of the advance paid:
- The employer’s liability to the person will be discharged;
 - The rights the person had in relation to that liability in the winding up or bankruptcy of the employer become rights of the Commonwealth; and
 - So far as the advance was for a particular employment entitlement, the Commonwealth will have the same priority as the person had for that entitlement.

Clause 32 – Amount of advance attributable to particular employment entitlements if advance reduced for debts to employer

122. Clause 32 provides for how reductions made to a person’s advance under clause 17 (which is about reduction for the person’s debts to the employer) are apportioned between the person’s employment entitlements for the purpose of establishing the amount claimed against the different priorities recognised in the Corporations Act and the Bankruptcy Act.
123. Subclause 2 lists the types of employment entitlement and specifies that if the debt related to a particular entitlement then it is this amount of this entitlement that will be reduced to the extent of the debt.
124. Subclause 3 applies if the amount of the debt that is being applied against the person’s advance does not relate to a particular employment entitlement listed in subclause 2. In this situation, the reduction will be taken to have applied proportionally to the employment entitlements that the person would have otherwise been entitled to.

Clause 33 – Recovery of advance for employment for partnership

125. Clause 33 creates special provision for partnerships, with the clauses 29, 30 and 31 applying in relation to each of the partners who employed the person. The purpose of the term ‘2 or more of the partners’ is described above in the definition of ‘insolvency event’ in clause 5.
126. Recovery of an advance from multiple partners subject to winding up or bankruptcy proceedings could potentially result in the Commonwealth recovering an advance multiple times. Paragraph (b) prevents this outcome by stating that the Commonwealth cannot recover amounts from all partners totalling more than the amount of the advance.

Division 2—Recovery from person eligible for advance

Clause 34 – Recovery from person eligible for advance

127. Clause 34 provides an avenue for recovery of amounts advanced to a person if that person later receives an amount for an employment entitlement that formed part of the original advance. This does not include later payments made by the Commonwealth, the liquidator or bankruptcy trustee of the employer or recipient of the advance. This clause supports the object of the Bill to only make advances on account of unpaid employment entitlements where the former employee cannot get payment of the entitlement from another source.
128. If a person who has received an advance for employment entitlements and later receives an amount from another party for that same entitlement, a debt becomes due by the person to the Commonwealth for the lesser of the following amounts:
- The totality of the later amount; or
 - The difference between the advance and the sum of:

Part 5—Recovery of advance

- The amounts paid to the Commonwealth in the winding up or bankruptcy of the employer because of Part 5, Division 1 of this Bill; and
- The debts (if any) created by previous operations of this section in relation to the person.

129. A debt arising under this clause may be recovered by the Secretary, on behalf of the Commonwealth, in a court of competent jurisdiction.

Part 6—Administration

Overview

130. Part 6 contains provisions about decision-making, internal review of decisions and review of decisions by the AAT. It also contains provisions relating to information management and delegation of decision-making.
131. Division 1 provides for decision-making about whether a person is eligible for an advance for his or her unpaid entitlements, and about the amount of the advance.
132. Division 2 provides for review of decisions about eligibility and advances made in accordance with Division 1. Decisions may be reviewed on the initiative of the Secretary or on application by a person seeking payment of an advance.
133. Division 3 makes provisions for the management of information.
134. Division 4 provides for arrangements about information and dealing with payments.

Notes on clauses

Division 1—Decision-making about advances

Clause 35 – Presuming accuracy of certain information

135. This clause provides that for the purposes of deciding whether a person is eligible for an advance, and the amount of such an advance, the Secretary may presume that information about the person that is provided by an insolvency practitioner (as defined in clause 5) is accurate. Information provided by insolvency practitioners forms the evidentiary basis for determining claims in many situations. Insolvency practitioners also have obligations when providing information in relation to outstanding employment entitlements in insolvency events.
136. While this provision allows the Secretary to presume the accuracy of information provided by insolvency practitioners, this provision is not intended to allow alternative evidence presented by claimants to be ignored. In such situations, the decision maker will weigh up any competing evidence in reaching a determination.
137. This provision also importantly allows the Secretary to choose to not rely on information provided by an insolvency practitioner, which will allow the Secretary to process claims that represent low value and low risk claims that are to be paid directly by the Department. For example, an individual claim at or below \$2500 would be a relatively ‘low value claim’ and where the Commonwealth’s right to recover the amount is sufficiently certain, the claim would be relatively low risk.
138. The Secretary would make decisions about when to process the claim as a ‘low risk, low value claim’ with reference to internal guidance and established procedures.

Clause 36 – Giving notice of decisions made under section 15

139. Subclause 1 provides that the Secretary must give a person written notice of a decision made under subclause 15(1), which is a decision about whether a person is eligible for an advance. It also provides that the Secretary must give written notice of a decision made under subclause 15(2), which is a decision about the amount of an advance a person is eligible for.
140. Subclause 2 provides that the notice must set out the terms of the decision, written reasons for the decision and the person’s rights to have the decision reviewed.

Division 2—Review of decisions about advances

Subdivision A—Internal review on the Secretary’s own initiative

Clause 37 – Review on the Secretary’s own initiative

141. Subclause 1 provides that if the Secretary is satisfied that there is sufficient reason, the Secretary may review a decision about whether a person is eligible for an advance, or a decision about the amount of the advance.
142. Subclause 2 provides that the Secretary may review decisions under subclause 1 even if an appeal has already been made to the AAT.
143. Subclause 3 provides that the Secretary cannot initiate an internal review in relation to a decision under subclause 1 if that decision is already the subject of an internal review under subdivision B – that is, an internal review on application by a person as to whether they are eligible for an advance, or the amount of an advance they are eligible for.
144. Subclause 4 provides that after reviewing the decision made under subclause 1, the Secretary can make a ‘review decision’ which can affirm the decision, vary the decision or set aside the decision and substitute a new decision.
145. Subclause 5 provides that the Secretary must give the person written notice of review decision, setting out the terms of the decision and reasons for the decision.
146. Subclause 6 provides that failure to comply with subclause 5 does not affect the validity of the review decision.
147. Subclause 7 provides that the Secretary must give the Registrar of the AAT written notice of the review decision if the review decision varied, or substituted a new decision for the decision that was reviewed, and before the review decision on the Secretary’s own initiative was made, the person had already applied to the AAT for review of that decision.
148. Clause 37 allows the Secretary to review decisions on his or her own initiative, without affecting the rights of a person to make appeals to the AAT. If the Secretary’s own initiative review has an outcome that satisfies the applicant, the applicant’s appeal to the AAT need not continue. The Secretary’s notification will inform the AAT of the

Secretary's review decision; what is done about the notified decision will be a matter for the AAT.

Subdivision B—Internal review on application

Clause 38 – Application for review by Secretary

149. Subclause 1 provides that a person may apply to the Secretary for review of a decision about whether a person is eligible for an advance, or a decision about the amount of the advance.
150. Subclause 2 provides that the application must be made within 28 days after the date of the notice of the decision, or such longer time as the Secretary allows.
151. Subclause 3 sets out what an application must contain. Paragraph (a) provides that the application must state the reasons why the application is being made, and paragraph (b) provides that the application must set out, or be accompanied by, any information or documents relating to the reasons, other than information or documents referred to in the notice of decision.
152. Subclause 4 provides that a person may withdraw the application for review at any time before the review is completed.
153. Subclause 5 provides that the application may be withdrawn orally, in writing or in another manner approved by the Secretary.
154. Subclause 6 provides that if the application is withdrawn, it is taken to never have been made.

Clause 39 – Action on application for review

155. Subclause 1 provides that if a person applies for a review of a decision, the Secretary must review the decision and affirm it, vary it or set it aside and substitute a new decision.
156. Subclause 2 provides that the Secretary must give the person written notice of the decision made as a result of the review.
157. Subclause 3 provides that the notice must set out the terms of the decision made as a result of the review, written reasons for that decision and the person's rights to have that decision reviewed.

Subdivision C—Review by the Administrative Appeals Tribunal

Clause 40 – Application to the Administrative Appeals Tribunal for review

158. Subclause 1 provides that an application may be made to the AAT by a person for review of 2 types of decisions.

159. Subclause 1, paragraph (a) provides that an application can be made to the AAT for review of a decision about whether a person is eligible for an advance, which has been affirmed or substituted as a result of a person's application for review under subdivision B. (Subdivision B provides for reviews on application by a person, but not reviews on the Secretary's own initiative).
160. Subclause 1, paragraph (b) provides that an application can be made to the AAT for review of a decision about the amount of an advance, which has been affirmed or substituted as a result of a person's application for review under subdivision B. A person must exhaust a review under Subdivision B before proceeding with an external review under Subdivision C.
161. Subclause 2 provides that subclause 1 has effect despite subsection 27(1) of the AAT Act. Without this provision, any person whose 'interests are affected by the decision' would have standing to seek AAT review of a decision. The pool of individuals 'affected by the decision' could potentially include all other creditors of the employer. Given the purpose of the scheme is to advance unpaid employee entitlements, it would be inappropriate to allow other creditors to seek to have decisions about a person's eligibility or entitlements reviewed by the AAT.
162. Subclause 3 provides that if, after a person has applied to the AAT for review of a decision, the Secretary varies or substitutes the decision under Subdivision A (which provides for reviews on the Secretary's own initiative), the application will be taken to be for a review of the varied or new decision.

Clause 41 – Limit on review of decision on amount of advance

163. Subclause 1 provides that clause 41 applies only to a review by the AAT of a decision about an amount of an advance that has been reduced because of a debt the person owed an employer.
164. Subclause 2 provides that the AAT cannot review the power under clause 17 to reduce an amount of an advance.
165. Subclause 3 provides that the AAT cannot exercise the power under clause 17 to reduce an amount of an advance.
166. Subclause 4 provides that this clause has effect despite subsection 43(1) of the AAT Act.
167. This provision has been included to recognise the Department's reliance on the information provided by insolvency practitioners in relation to debts owed by employees to their former employer. In practice, the advice provided by insolvency practitioners in relation to debts would be acted on automatically in many situations. Review of this consideration by the AAT would be problematic as any findings would not affect the decision making of the insolvency practitioner, who ultimately has the power to decide whether a person's debts to their employer should be offset against their employment entitlements. Removing the

ability of the AAT to review the offsetting of debts would not hinder a claimant's ability to contest the insolvency practitioner's decision under the Corporations Act.

Division 3—Information management

Clause 42 – Use and disclosure of personal information by the Department for administering this Act

168. This clause sets out what the Department may do with specified personal information for the purposes of administering this Act.
169. Subclause 1 paragraph (a) provides that for the purposes of administering this Act, the Department may use personal information about an employer, or a current or former employee of an employer. Paragraph (b) provides that for the purposes of administering this Act, the Department can disclose that information to any of the following: an insolvency practitioner for the employer; a person with whom the Commonwealth has a contract to pass on to a former employee of the employer payments made under this Act; or a person who is, will be, or has made, a payment to a former employee, associated with the amount owing or owed to the former employee.
170. This clause will facilitate the disclosure of information by the Department to support the payment of an individual's employment entitlements. Subparagraph (b)(iii) is intended to allow for the disclosure of information to third parties proposing to make payments related to a person's employment entitlements, such as industry long service leave trust funds.
171. While applicants are asked to agree to a privacy disclosure statement, this provision will allow the Department to disclose information relating to non-claimants (such as directors of a company) or employees who have not yet submitted a claim form.

Clause 43 – Use and disclosure of personal information by insolvency practitioners and payment intermediaries

172. Subclause 1 provides that, for the purposes of facilitating the administration of this Act, an insolvency practitioner of an employer may use, or disclose to the Department, personal information about the employer or a current or former employee.
173. Subclause 2 provides that, for the purposes of facilitating the administration of this Act, a person with whom the Commonwealth has a contract to pass on to a former employee payments made under this Act may use, or disclose to the Department, personal information about the former employee or employer.

Clause 44 – Use and disclosure of personal information by persons making payments to former employees

174. This clause provides that, for the purposes of facilitating the administration of this Act, a person who is making, proposes to make or has made a payment to a former employee, associated with an amount owing or owed to the former employee, may use, or disclose to the Department, personal information about the former employee or employer.

Clause 45 – Disclosure of personal information to certain agencies

175. This clause provides that, for the purposes of facilitating the exercise of powers, or performance of functions, that an agency (as defined in the *Privacy Act 1988*) has in relation to the Corporations Act, the Bankruptcy Act or entitlements of current or former employees, the Department may disclose to the agency personal information that the Department has in connection with the administration of this Act. That information can be about an employer, an officer of an employer (as defined in the Corporations Act), an insolvency practitioner for an employer, or a current or former employee of an employer.
176. This clause will facilitate compliance and regulatory activities undertaken by other Commonwealth agencies which relate to payment of employment entitlements.

Division 4—Arrangements for information and dealing with payments

Clause 46 - Arrangements for information and dealing with payments

177. Subclause 1 provides that on behalf of the Commonwealth, the Secretary may make, vary, administer and otherwise give effect to an arrangement, agreement or contract for the following:
- Provision of information about a person that is relevant to deciding whether a person is eligible for an advance, and the amount of the advance (paragraph (a))
 - Dealing with amounts of an advance that the Secretary has decided a person is eligible for (paragraph (b)).
178. Subclause 2 provides that this section does not limit the executive powers of the Commonwealth.

Division 5—Delegation

Clause 47 – Delegation of Secretary’s powers and functions

179. This clause provides that the Secretary may delegate certain of the Secretary’s powers to an APS employee.
180. Subclause 1 provides that the Secretary may delegate in writing to an APS employee in the Department any or all of the Secretary’s powers and functions under this Act, except for the following provisions in this Bill:
- Clause 25 (about disregarding recently agreed changes in terms and conditions);
 - Subclause 28(2) (about paying advances in instalments); and
 - Subclause 38(5) (about approving the manner of withdrawing an application for internal review).

181. The Department received almost 18,000 applications over the 2011/2012 period. Managing this volume of claims requires significant administrative workflow management and operational infrastructure, which in turn requires decisions under the Bill to be delegated to operational staff operating under close supervision. If an applicant feels that a decision has been improperly made, they may exercise their rights of review as provided for under Division 2.
182. Subclause 2 provides that, in addition to subclause 1, the Secretary may also delegate in writing to an SES employee, or acting SES employee, in the Department, any or all of the Secretary's powers and functions under the following provisions:
- Clause 25 (about disregarding recently agreed changes in terms and conditions); and
 - Subclause 38(5) (about approving the manner of withdrawing an application for internal review).
183. A note indicates that 'SES employee' and 'acting SES employee' are defined in section 2B of the *Acts Interpretation Act 1901*.
184. 'APS employee' is also defined in the *Acts Interpretation Act 1901*.
185. Subclause 3 provides that the Secretary may delegate his or her power under subclause 28(2) about paying advances in instalments. This delegation must be in writing to either an SES employee, or an acting SES employee, or an APS employee who holds, or is acting in, an EL2 position (or an equivalent position) in the Department.
186. Subclause 4 provides that in exercising powers or performing functions under a delegation under this section, the delegate must comply with any directions of the Secretary.

Clause 48 – Delegation of Minister's powers

187. Clause 48 provides that the Minister may delegate in writing the powers he or she has under clause 49 to the Secretary or an SES employee in the Department who is at or acting at a Band 3 level.
188. Subclause 2 provides that in exercising powers under a delegation under this clause, the delegate must comply with any directions of the Minister.

Part 7—Miscellaneous

Overview

189. Part 7 deals with miscellaneous matters related to the operation of this legislation.

Notes on clauses

Clause 49 – Extended operation of this Act in relation to employers in administration under the *Corporations Act 2001*

190. Subclause 1 and 2 provides the Minister may make a declaration to extend the operation of the proposed scheme to employees of a specified employer that is under administration under Part 5.3A of the Corporations Act. The purpose of these provisions is to facilitate fast tracking of claims for unpaid employee entitlements where:

- There is a high degree of certainty that liquidation of the employer will occur shortly; and
- It will be practicable to administer the Act in relation to the employees of the specified employer.

191. Together these requirements provide that the discretion will only be exercised in situations where there is sufficient certainty about the employer's state of affairs to give effect to the scheme and where the Commonwealth's recovery rights under the Corporations Act will be not be compromised.

192. Subclause 3 provides that, for the purposes of administering the scheme, a declaration will:

- Treat the appointment of the administrator as the appointment of a liquidator; and
- Substitute the appointment of the administrator for the 'insolvency event' for the purposes of the time limits contained in subparagraph 14(2)(a)(i).

193. Subclause 4 provides that the Minister may make a legislative instrument revoking a declaration made under subclause 1.

Clause 50 – Schemes for assistance of workers who were not employees

194. In accordance with the object of the Bill in clause 3, the scheme established under this Bill provides for the payment of advances to former employees. For the purposes of the scheme, the term 'employee' refers to an employee at common law and does not include contractors.

195. In recognition of the evolving nature of employment relationships, clause 50 provides for the making of regulations establishing a scheme to provide financial assistance to individuals who are owed amounts for work they did for a person specified by the regulations (except as an employee of that person) who is insolvent or is reasonably

expected to be insolvent. Regulations made under subclause 1 would also provide for recovering amounts of that financial assistance.

196. Subclause 2 provides that regulations made under clause 50 may provide for the following:

- The determination of which individuals are eligible for financial assistance under the scheme;
- The determination of how much financial assistance individuals are eligible for under the scheme; and
- Matters relating to the administration of the scheme.

197. Subclause 3 provides that a regulation made for the purposes of clause 50 will not take effect before the end of the period in which it could be disallowed in either House of Parliament.

198. Clause 50 provides flexibility to cover employment relationships that extend beyond the traditional employee/employer paradigm. It is intended that this regulation making power would be used only when it is necessary to support of the objects of this Bill, as described in clause 3.

Clause 51 – Appropriation

199. Clause 51 provides that the Consolidated Revenue Fund is appropriated for the purposes of payments under this Bill.

200. The establishment of a standing appropriation is necessary as it is not possible to predict the number or value of entitlements that will be advanced in any particular year. A standing appropriation will also provide certainty to claimants by ensuring that sufficient funds will be available to meet all eligible entitlements.

Clause 52 – Recoverable payments

201. Clause 52 acknowledges that incorrect payments may be made inadvertently from time-to-time under the scheme and provides an avenue for the recovery of these funds.

202. Subclause 52 (2) provides that the amount of the payment that was not authorised by the Bill will be a debt due to the Commonwealth and may be recovered by the Secretary, on behalf of the Commonwealth, in a court of competent jurisdiction.

Clause 53 – Reports about recoverable payments

203. Clause 53 provides for the reporting of payments made under clause 705.

Clause 54 – Right to financial assistance may be reduced, cancelled etc. without compensation

204. Clause 54 provides that a right to payment of financial assistance under this Bill is granted on the basis that the amount of assistance may be reduced under Part 3 or cancelled, revoked, terminated or varied by or under later legislation.
205. Subclause 54(c) provides that no compensation is payable if the amount of financial assistance is reduced under Part 3 or the regulation, or the right is cancelled, revoked, terminated or varied by or under later legislation.

Clause 55 – Regulations

206. Clause 55 provides that the Governor-General may make regulations prescribing matters as required or permitted by this Bill to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Bill.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Entitlements Guarantee Bill 2012

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of Fair Entitlements Guarantee Bill 2012 (the Bill)

The Bill provides a scheme for the provision of financial assistance (called an ‘advance’) to former employees whose employment has ended as the result of the winding up or bankruptcy of their employer. After making an advance, the Commonwealth assumes the individual’s right to recover these amounts through the winding up or bankruptcy process of their employer.

Human Rights Implications

Right to Equality and Non-discrimination

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The rights to equality and non-discrimination in Articles 2 and 26 ensure that no one is denied their rights because of a prohibited ground (for example race, colour or sex). In addition to the prohibited grounds specified in these articles, discrimination is also prohibited on 'other status'. The UN Human Rights Committee has held that ‘nationality’ may be a prohibited ground for discrimination.

To be eligible for an advance under the Bill, clause 10(1)(g) of the Bill requires a person to be an Australian citizen or the holder of a permanent visa or a special category visa under the *Migration Act 1958*. Since this subclause makes citizenship or visa status a condition of eligibility for financial assistance under the Bill, it engages and limits the rights to equality and non-discrimination under Articles 2 and 26.

The rights to equality and non-discrimination are not absolute rights and can be subjected to permissible limits. The UN Human Rights Committee has recognised that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.

The Bill establishes an assistance scheme, which is intended to operate as a safety net for eligible persons. In this way it is analogous to social security legislation, and care has been taken to maintain some consistency with conditions of eligibility in analogous social security legislation. This is a legitimate objective.

The limitation is also reasonable in the context of the Bill's purpose to provide a safety net for persons whose employment has ended due to the insolvency of their employer. Importantly, the restriction on eligibility in clause 10(1)(g) will not in any way affect an excluded person's right to recover any unpaid entitlements from their former employer.

It is considered that the limitations on the right to equality and non-discrimination which are contained in clause 10(1)(g) of the Bill are not incompatible with the rights. The Bill pursues a legitimate objective and making citizenship, residency, or visa status a condition of eligibility for financial assistance under the Bill is reasonable, necessary and proportionate to that objective.

Right to Privacy

The right to privacy in Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation. Division 3 of the Bill provides for the sharing of personal information about an employer or employee between the Department and other parties who have a need for the information in relation to the administration of the Bill. Because Division 3 of the Bill limits a person's right to control their personal information, it engages and limits the right to privacy under Article 17.

Article 17 provides for an implied permissible limitation on the right to privacy to the extent that the limitations are not arbitrary or unlawful. In order for an interference with the right to privacy not to be 'arbitrary', the interference must be for a reason consistent with the ICCPR and reasonable in the particular circumstances. Reasonableness, in this context, involves notions of proportionality, appropriateness and necessity.¹

Use of personal information

Clauses 42(a), 43(1)(a), 43(2)(a) and 44(a) of the Bill provide that for the purposes of administering the Bill, the following parties may use personal information about an employer, or a current or former employee:

- the Department;

¹ *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) at 8.3

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- specified parties, which are:
 - an insolvency practitioner of an employer;
 - a person with whom the Commonwealth has a contract to pass on to a former employee of an employer payments made under this Bill; or
 - a person, who is making, proposes to make or has made a payment to a former employee of an employer associated with an amount owing or owed to the former employee in connection with his or her employment.

The very nature of a scheme which provides for the payment of entitlements necessitates the use of personal information about the person making a claim. Information will only be used for the purposes of administering the Bill and, in practice, the administration of the Bill will include safeguards to prevent the arbitrary use of personal information. For example, applicants making a claim under the Bill will provide consent to the use of their personal information for the purposes of administering the Bill.

With respect to information which is about an employer, this information will only relate to the employer in its professional capacity, and is necessary for the processing of a former employee's claim.

Disclosure of personal information- assessment of claims

Clauses 42(b), 43(1)(b), 43(2)(b) and 44(b) provide for the disclosure of personal information about an employer, or a current or former employee, between the Department and the specified parties. The disclosure of personal information between the Department and the specified parties under clauses 42, 43 and 44 is considered proportionate, appropriate and necessary to facilitate the effective administration of the Bill. It is vital that the Department considers personal information which is provided by the specified parties to determine whether a person is eligible for an advance and accurately calculate the amount of such an advance. The ability of these parties to disclose information to the Department is critical in ensuring that applications are assessed and money disbursed in a timely manner.

Set out below are explanations about each clause, and why disclosure of personal information is necessary in each particular circumstance.

It is also relevant to note that each specified party or agency to which information will be disclosed has its own legal and professional obligations about the collection, storage and use of personal information under privacy laws. In addition, a person who is contracted by the Commonwealth for the purpose of passing an advance on to a recipient will be bound by the privacy clauses in that contract.

Furthermore, the administrative safeguards described above in relation to the use of personal information (for example obtaining consent) will also apply to the disclosure of personal information.

Clause 42

Clause 42(b) provides that for the purposes of administering the Bill, the Department can disclose personal information about the employer or employee to the specified parties. This subclause facilitates the disclosure of information by the Department where it is necessary to do so to assess a person's claim.

It is important that the Department consults the specified parties as they are likely to have information that would assist the Department to accurately determine a person's eligibility for an advance, as well as the amount of the advance to be paid under the Bill. For example, if a person is owed long service leave, clause 42(b)(iii) would enable the Department to provide the person's identification details (for example name and date of birth) to an industry long service leave trust fund. This would allow the trust fund to correctly identify the person and thereby provide the Department with details of the person's long service leave entitlements.

Clause 42(b) limits the Department's ability to disclose information by specifying the parties to which it can disclose personal information and requiring that the disclosure is only for the purposes of administering the Bill. Importantly, the specified parties are professional bodies which have obligations with respect to the collection, storage and use of personal information under privacy laws. In addition, the Bill does not permit the specified party to disclose the information to any other party.

Clause 43

Clauses 43(1)(b) and 43(2)(b) enable an insolvency practitioner (including a liquidator or a bankruptcy trustee) or payment intermediary to disclose personal information about an employer or current or former employee to the Department for the purposes of administering the Bill. These provisions facilitate the Department's ability to gather the information required to make decisions about advances under the Bill.

For example, clause 35 provides that for the purposes of deciding whether a person is eligible for an advance and the amount of such an advance, the Secretary may presume that information relating to the person that is provided by the liquidator or bankruptcy trustee is accurate. Clause 43(1)(b) facilitates the operation of clause 35 by enabling the liquidator or bankruptcy trustee to disclose this information to the Department. In order to accurately determine a person's eligibility for an advance and the amount of such an advance, it is important that the Department considers personal information which is provided by the specified parties. In the majority of cases, this information is held by a liquidator or bankruptcy trustee.

Clause 44

Clause 44(b) enables a person making payments to former employees to disclose personal information about the former employee or employer to the Department for the purposes of administering the Bill. Similar to clause 43, this provision facilitates the Department's ability to gather the information required to make decisions about advances under the Bill.

For example, clause 19 provides that the amount to be advanced to a former employee is determined by working out the basic amount for their entitlements (for example annual leave and unpaid wages) and then reducing that amount by amounts, such as a payment which has already been made by another person to the former employee. Clause 44(b) would enable a person who has made a payment to a former employee to provide details of this payment to the Department. This information would allow the Department to accurately calculate the amount of the advance, in accordance with clause 19.

Disclosure of personal information to certain agencies- Clause 45

Clause 45 of the Bill provides that for the purposes of facilitating the exercise of powers, or performance of functions, that an agency (as defined in the *Privacy Act 1988*) has in relation to the *Corporations Act 2001* (the Corporations Act), the *Bankruptcy Act 1966* or entitlements of employees or former employees, the Department may disclose to the agency personal information that the Department has in connection with the administration of the Bill. That information can be about an employer, an officer of an employer (as defined in the Corporations Act), an insolvency practitioner for an employer, or a current or former employee of an employer.

The disclosure of personal information by the Department will facilitate enforcement activities undertaken by other Commonwealth agencies. For example, the disclosure of information about a company director to the Australian Securities and Investments Commission would assist in a civil proceeding against the director for the contravention of the director's duties under the Corporations Act. Such disclosure would be proportionate, appropriate and necessary to the enforcement of the Corporations Act.

Further, with respect to information which is provided about an employer, an office or an insolvency practitioner, this information will only relate to such persons in their professional capacity. Importantly, each specified party or agency to which information will be disclosed has its own legal obligations concerning the collection, storage and use of personal information under privacy laws.

Right to Social Security

Article 9 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR) provides that, 'the States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.' The Committee on Economic, Social and Cultural Rights has stated that the right to social security encompasses the right to access benefits, whether in cash or in kind, without discrimination in order to secure protection from lack of work-related income caused by unemployment².

The Bill establishes an assistance scheme, which is intended to operate as a safety net for persons whose employment has ended due to the insolvency or bankruptcy of their employer. This safety

² Committee on Economic, Social and Cultural Rights, *General Comment 19, The Right to Social Security*, U.N. Doc. E/C.12/GC/19 (2008)

net could be characterised as ‘social insurance’ because it ensures that employees’ unpaid entitlements are met when their employer becomes insolvent. It thus seeks to protect individuals from lack of work-related income due to unemployment, and in this way, promotes the right to social security. As mentioned above, the Bill limits the right to non-discrimination because eligibility for an advance is limited to Australian citizens or the holders of a permanent visa or a special category visa under the *Migration Act 1958*. However, as highlighted above, this limitation pursues a legitimate objective and is considered reasonable, necessary and proportionate to that objective.

Conclusion

The Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

William Richard Shorten, Minister for Employment and Workplace Relations